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SEARCH & SEIZURE IN DUI CASES

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1. OVERVIEW

1.1 Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- "[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016) (citation omitted).
- "The text of the Fourth Amendment does not specify when a search warrant must be obtained." *Birchfield*, 136 S. Ct. at 2173.

1.2 Search & Seizure Checklist (abridged)

- Did the search comply with the Fourth Amendment?
  - Was there a search?

  AND
  - Did the police obtain a warrant?

  OR
  - Was there an exception to the warrant requirement:
    - Were there exigent circumstances? (+ *probable cause*)

    OR
    - Was the search incident to arrest?* (+ *PC*)

    OR
    - Did the suspect consent to the search?

AND

- Did the search comply with Arizona law?
  - Was the suspect under arrest and did he expressly consent to the search?

  OR
  - Was the suspect "dead, unconscious, or otherwise otherwise in a condition rendering the person incapable of refusal"? (+ *PC*)

  OR
  - Did the officer obtain a portion of a blood sample drawn by medical professionals for medical purposes when the suspect voluntarily received medical treatment? (+ *PC*)

2. SUPREME COURT DECISIONS

2.1 *Schmerber v. California*, 384 U.S. 757 (1966).

- Without a warrant, an officer direct a physician to draw blood from Schmerber, who was receiving treatment at a hospital.
- *Held*: The search was permissible under the exigent circumstances exception.
  - "The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence." *Id.* at 770.
  - The emergency was caused by the fact that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Id.* at 770.
  - The emergency was exacerbated by the "special facts" of the time to take Schmerber to a hospital and investigate the scene of the accident.

2.2 *Missouri v. McNeely*, 569 U.S. 141 (2013).

- An officer took McNeely to a hospital and, without a warrant, directed a hospital lab technician to draw his blood.
- *Held:* the search violated the Fourth Amendment.
- *Plurality:* There is an emergency only when the police cannot obtain a warrant before the evidence significantly degrades.
  - Exigent circumstances requires a totality of the circumstances test.
  - *Schmerber* applied a totality of the circumstances approach and not a rule of *per se* exigency.
  - The court rejected the State's claim that the natural dissipation of alcohol in the bloodstream posed a *per se* emergency.
  - The court employed a "case-by-case assessment" of whether the police "can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search."
- The court ratified some form of implied consent:

  "As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without

undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. … Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* at 160–61.

- *Concurrence (Roberts, C.J.):* There is an exigency when police cannot obtain a warrant before a hospital could draw blood.
  - Agreed that there is no *per se* exigency for the metabolization of alcohol.
  - Would have given additional guidance:
    - "If there is time to secure a warrant before blood can be drawn, the police must seek one." *Id.* at 173.
    - "If an officer could reasonably conclude that there is not sufficient time to seek and receive a warrant, or he applies for one but does not receive a response before blood can be drawn, a warrantless blood draw may ensue." *Id.* at 173.
- The disagreement appears to stem on whether the State would need to prove that delaying a blood draw to obtain a warrant would significantly compromise the ability to determine BAC.

2.2.1 When do exigent circumstances exist? An example: *State v. Johnson*, No. 2 CA-CR 2015-0221, 2016 WL 1039464 (App. 2016) (Mem. decision).

- Around 8:40 p.m., Johnson collided into another vehicle, and was rushed to the hospital with what doctors feared may be life threatening injuries.
- An officer arrived at the hospital around 9:00 to find Johnson intubated and possibly unconscious, and surrounded by a team of medical professionals.
- A nurse said she was going to draw blood for medical purposes, took two vials from the officer, and drew blood for both of them at 9:16 p.m.

- Johnson was taken away for additional testing, which could have resulted in emergency surgery, but ultimately did not.
- *Held*: The search was lawful under the exigent circumstances exception.
  - Given that Johnson's injuries appeared life threatening and testing could have resulted in emergency surgery that would have prevented a blood draw, it was reasonable for the officer to believe he could not have obtained a warrant before the blood evidence lost its value.

2.3 *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

- 3 consolidated cases:
  - Birchfield pleaded guilty for refusing to take a blood test, a crime under North Dakota law.
  - Minnesota charged Bernard for refusing to take a breath test, a crime under Minnesota law.
  - Beylund agreed to a blood test in North Dakota upon hearing that refusal was a crime; the results were used to suspend Beylund's license.
- *Held*: affirmed Bernard's conviction.
- Breath tests are lawful searches incident to arrest, but blood tests are not.
  - Officers can search an arrested suspect's person "in order to prevent the arrestee from obtaining a weapon or destroying evidence." *Id.* at 2175.
  - Both breath and blood tests involve the destruction of evidence.
- The difference in result turns on the degree of intrusion and whether the sample reveals other types of information.
  - Breath tests have a "negligible intrusion" and only reveal one type of information: alcohol concentration.
  - Blood tests are "significantly more intrusive" because they requiring piercing the skin and reveal more information than just a BAC reading.
- Blood tests are not saved by implied consent.
  - Approved of the general concept of "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at 2185.

- "It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.*
- Agreed with the United States that like Fifth Amendment cases, there needed to be a "nexus" between the search and the "privilege of driving" and the penalty must be "proportional to the severity of the violation."

- Result:
  - Reversed Birchfield conviction.
  - Affirmed Bernard's conviction.
  - Remanded to determine whether Beylund's consent was voluntary.

3. AZ LAW—SEARCH INCIDENT TO ARREST

3.1 *State v. Navarro*, 241 Ariz. 19 (App. 2017) (Division 2).

- Navarro was arrested, then expressly consented to a breath test after hearing the defective admin *per se* form at issue in *Valenzuela*. (see below)
- *Held*: affirmed the trial court's denial of suppression.
  - "Under the Fourth Amendment to the United States Constitution, suppression was not required here because, as *Birchfield* held, a warrantless breath test is allowed as a search incident to a lawful DUI arrest." *Id.* at 21, ¶ 4.
  - Rejected challenge under Ariz. Const., Art. II, § 8.
    - Cited *State v. Berg* 76 Ariz. 96 (1953), which allowing warrantless breath tests because "requiring a DUI arrestee to exhale into a testing device is a 'slight inconvenience' that represents a 'burden which such defendant must bear for the common interest.'"
  - Footnote 3:
    - Although our implied consent statute, A.R.S. § 28–1321 normally prohibits law enforcement officers from collecting samples for chemical testing in the absence of either actual consent or a search warrant, Navarro has not developed any argument that a violation of this statute requires the suppression of evidence in a

criminal trial. Because this distinct legal question is not properly before us, we do not address it.

- Petition for review denied

4. AZ LAW—CONSENT

4.1 A.R.S. § 28–1321: Arizona's Implied Consent Statute:

A. A person who operates a motor vehicle in this state gives consent, subject to § 4-244, paragraph 34 or § 28-1381, 28-1382 or 28-1383, to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for any offense arising out of acts alleged to have been committed in violation of this chapter or § 4-244, paragraph 34 while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs. The test or tests chosen by the law enforcement agency shall be administered at the direction of a law enforcement officer having reasonable grounds to believe that the person was driving or in actual physical control of a motor vehicle in this state either:

1. While under the influence of intoxicating liquor or drugs.
2. If the person is under twenty-one years of age, with spirituous liquor in the person's body.

B. After an arrest a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section, and if the violator refuses the violator shall be informed that the violator's license or permit to drive will be suspended or denied for twelve months, or for two years for a second or subsequent refusal within a period of eighty-four months, unless the violator expressly agrees to submit to and successfully completes the test or tests. A failure to expressly agree to the test or successfully complete the test is deemed a refusal. The violator shall also be informed that:

1. If the test results show a blood or breath alcohol concentration of 0.08 or more, if the results show a blood or breath alcohol concentration of 0.04 or more and the violator was driving or in actual physical control of a commercial motor vehicle or if the results show there is any drug defined in § 13-3401 or its metabolite in the person's body and the person does not possess a valid prescription for the drug, the violator's license or permit to drive will be suspended or denied for not less than ninety consecutive days.
2. The violator's driving privilege, license, permit, right to apply for a license or permit or nonresident operating privilege may be issued or reinstated following the period of suspension only if the violator completes alcohol or other drug screening.

4.2 Express consent, rather than implied consent, is required to trigger the Fourth Amendment's consent exception.

4.2.1 *Carillo v. Houser*, 224 Ariz. 463 (2010).

- Officers arrested Carrillo and, without a warrant, drew his blood near a DUI van.
  - Carrillo argued at a suppression hearing that he only spoke Spanish and did not consent to the test.
- *Held:* the blood draw violated the text of A.R.S. § 28-1321, which requires "express agreement" to take a DUI test.
  - Subsection (B) says "[a] failure to expressly agree to the test or successfully complete the test is deemed a refusal."
  - Subsection (D) says "[i]f a person under arrest refuses to submit to the test," the test "shall not be given" absent an exception.
  - The "implied consent" is an implicit agreement to be subject to administrative sanctions for refusal; not an irrevocable agreement to submit to a DUI test.
  - The court resolved the case on statutory grounds, not on the Fourth Amendment.
  - Expressly declined to decide whether officers can draw blood from unconscious DUI suspects.

4.2.2 *State v. Butler*, 232 Ariz. 84 (2013).

- School officers and a sheriff's deputy detained Butler, a juvenile, in a high school room on suspicion of using marijuana.
- After admitting to smoking marijuana off-campus, the officer arrested Butler and briefly handcuffed him, before reading the implied consent admin *per se*.
- Butler then agreed to a blood draw.
- *Held:* The blood draw violated the Fourth Amendment.
  - The court the State's argument that Butler implicitly "consented" to the blood draw by driving (under A.R.S. § 28-1321(A)), in light of *Carillo*.
  - The court further held that "independent of § 28–1321, the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw." *Id.* at 88, ¶ 18.
  - Under the totality of the circumstances (including age), Butler's consent here was the involuntary.

4.2.3 *State v. Valenzuela*, 239 Ariz. 299 (2016).

- Valenzuela agreed to a blood draw after hearing an officer read him the *admin per se* form stating "Arizona law requires you to submit" to a DUI test.
- *Held:* Valenzuela's consent was involuntary under the Fourth Amendment.
  - Acquiescence to a claim of lawful authority is not voluntary consent when the officer effectively announces the suspect has no legal right to refuse (relying on *Bumper v. North Carolina*, 391 U.S. 543 (1968)).
  - An assertion of lawful authority does not render the suspect's agreement involuntary *per se* but it is an important factor to consider in the totality of the circumstances to determine voluntariness.
  - Rejected the argument that Valenzuela implicitly agreed to the search under A.R.S. § 28–1321(A):

    "Although § 28–1321 validly provides an arrestee's consent to civil penalties for refusing or failing to complete requested tests, we have rejected the contention that the implied consent law operates to prospectively provide

consent to a search for Fourth Amendment purposes" *Id.* at 307, ¶ 25.

- Provided guidance for a correct admin *per se* instruction:

  A law enforcement officer can invoke the implied consent law without infringing on an arrestee's Fourth Amendment rights by following the procedure set forth in § 28–1321(B). After making a DUI arrest, the officer should ask whether the arrestee will consent to provide samples of blood, breath, or other bodily substances for testing. If the arrestee expressly agrees and successfully completes testing, the officer need not advise the arrestee of the statutory consequences for refusing consent. The officer must, however, advise the arrestee before testing that the outcome of the tests may result in the penalties set forth in § 28–1321(B) (1) and (2). If the arrestee refuses to consent to testing or fails to successfully complete the tests, the officer should advise the arrestee of the consequences for refusal or incomplete testing as provided in § 28–1321(B), and then ask again whether the arrestee will consent to testing. Although this choice "will not be an easy or pleasant one for a suspect to make," this difficulty does not make the decision coerced. South Dakota v. Neville, 459 U.S. 553, 564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (considering Fifth Amendment challenge to admission in evidence of refusal given in response to implied consent admonition). If the arrestee again refuses to agree to testing or fails to successfully complete testing, a test must not be given unless the officer secures a search warrant, except that the officer may validly obtain a sample of blood or other bodily substances taken for medical purposes, A.R.S. §§ 28–1321(D)(1), – 1388(E).

- Affirmed the case under the good faith exception (*see* below).

4.3 Implied consent (or what is left of it) does not violate the unconstitutional conditions doctrine.

- *State v. Okken*, 238 Ariz. 566 (App. 2015).

5. AZ LAW—EXIGENCY AND THE MEDICAL EXCEPTION

5.1 A.R.S. § 28–1388(E): The Medical Exception

> Notwithstanding any other law, if a law enforcement officer has probable cause to believe that a person has violated § 28-1381 and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes. A person who fails to comply with this subsection is guilty of a class 1 misdemeanor.

5.2 *State v. Cocio*, 147 Ariz. 277 (1985).

- During Cocio's treatment following an automobile collision, a hospital lab technician drew his blood pursuant to a doctor's order, and a police officer asked for a portion of the sample.
- *Held:* The draw complied with Arizona law and the Fourth Amendment
  - A formal request is not required for officers to obtain blood under the medical exception.
  - "Any reason" means the blood must be drawn by medical personnel for a medical purpose "so as not to conflict with the orderly administration of care to those injured."
  - 3-part test for obtaining blood under the medical exception statute:
    (1) There was probable cause;
    (2) There were exigent circumstances;
    (3) The blood was drawn for medical purposes;
  - The court of appeals found exigent circumstances because "[t]he highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time." *Id.* at 286.
  - The court also found the police intrusion "minimal" because it did not involve a needle puncture (which was done for medical purposes) but instead "merely a sampling off of an additional portion of the defendant's blood." *Id.* at 286–87.

5.3 *Lind v. Superior Court*, 191 Ariz. 233 (App. 1998).

- Hospital staff drew two extra files of Lind's blood and later turned them over to an officer upon request.
- *Held*: The extra vials were drawn for medical purposes
- "[T]he hospital draws the entire sample "for medical purposes" within the meaning of the statute" because the statute necessarily requires hospital staff to draw more blood than they need.

5.4 *State v. Nissley*, 241 Ariz. 327 (2017)

- Nissley struck and killed a hiker while driving.
- When paramedics arrived on scene, Nissley violently resisted being transported to the hospital.
- The paramedics concluded Nissley was incoherent, sedated, and transported him to the hospital where they drew blood and provided a portion of the sample to the police.
- *Held:*
  - A Fourth Amendment search occurred when hospital staff handed over blood to the police as required by A.R.S. § 28–1388(E)
  - Noted *McNeely's* holding that the State needed to prove exigent circumstances by showing "that under circumstances specific to those cases, it was impractical to obtain a warrant."
  - However, this did not dispose of the case because Nissley was not arguing lack of exigent circumstances.
  - Agreed with court of appeals cases that added a 4th requirement to establishing the medical exception: "the state must prove that a blood sample obtained under the medical blood draw exception was drawn in compliance with the defendant's right to direct his or her own treatment."
  - The State must prove that either:
    - The suspect's consent to treatment was free and voluntary
    - The suspect was incapable of giving consent, "such as when the defendant was unconscious or delirious." *Id.* at 333 ¶ 21.
  - Also affirmed that when the patient is incapable of giving consent, the police could have directly ordered a blood draw under A.R.S. § 28–1388(C).

- Summary: To invoke the medical exception, the State must prove:
  (1) There was probable cause;
  (2) There were exigent circumstances;
  (3) The blood was drawn by medical personnel for medical purpose;
  (4) Treatment complied with the suspect's right to direct his or her own medical treatment.
- Remanded for the trial court to apply this test.

6 GOOD FAITH AND THE EXCLUSIONARY RULE

6.1 The exclusionary rule does not apply when "the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful."

- The good faith rule applies when evidence is "obtained by an officer acting in objectively reasonable reliance on a statute." *Illinois v. Krull*, 480 U.S. 340, 349 (1987).
- The exclusionary rule also does not apply to "searches conducted in objectively reasonable reliance on binding appellate precedent." *Davis v. United States*, 564 U.S. 229, 238 (2011).
- This is based on premise that the ultimate goal of the exclusionary rule is to deter police misconduct and not to remedy the violation of a suspect's Fourth Amendment rights. *Davis*, 564 U.S. at 236.

6.2 *Valenzuela*, 239 Ariz. 299 (*revisited*)

- The court that the good faith exception applied to the officer's reading of the defective admin *per se* form because prior decisions described A.R.S. § 28-1321 as requiring a suspect to submit to testing.

6.3 *State v. Havatone*, 241 Ariz. 506 (2017).

- In 2012 (pre-*McNeely*), Havatone caused an automobile collision northeast of Kingman.
- Havatone was airlifted to a Las Vegas hospital for treatment where he fell unconscious.
- An Arizona DPS officer who smelled alcohol on Havatone's breath before he left Arizona contacted Nevada police officers to request that they obtain a sample of Havatone's blood.

- A Nevada officer directed hospital staff to draw blood from Havatone while he was unconscious.
- The State argued that because the case was decided before *McNeely*, officers had good faith reliance on *Schmerber*, *Cocio*, and the Unconscious Clause (A.R.S. § 28-1321(C).)
- *Held:* The search did not fall within the good faith exception.
  - As *McNeely* made clear, *Schmerber* never treated the metabolization of alcohol in the bloodstream as a *per se* exigent circumstance.
    - In fact, *Schmerber* stood for the proposition that metabolization is never enough and there must always be additional case-specific "special facts."
  - *Cocio* is distinguishable because it involved a medical exception draw under A.R.S. § 28-1388(E), which involves a lesser intrusion.
  - The Unconscious Clause did not support good faith reliance because after *Schmerber*, any reasonable officer should have known that A.R.S. § 28–1321(C) would not allow the warrantless blood draw of a suspect absent "special facts" establishing an emergency.
- The court remanded the case to determine whether Arizona's or Nevada's law applied for purposes of the good faith exception.
  - The trial court has since (correctly) held that Nevada law ought to apply (which would have satisfied the good faith exception).
  - The Fourth Amendment law of the situs (where the search occurred) should apply, rather than the law of the forum (where the prosecution occurs), because excluding the evidence in the forum state cannot deter officers in the situs state from committing future Fourth Amendment violations.
  - Merely asking an out-of-state officer to engage in a search does not make him or her your agents; such a request does not imply they should obtain the evidence at all costs.

7 TAKEAWAYS

- For purposes of search and seizure, implied consent is effectively dead.
- Under the Fourth Amendment, breath tests are generally admissible but blood tests require a specific exception (consent or a true emergency).
- Arizona's implied consent laws are not facially unconstitutional, but complying with them does not guarantee admissibility.
  - The unconscious clause and medical exception still exist, but only in the very narrow circumstances of a genuine emergency.
  - It is an open question whether failing to comply with Arizona's implied consent laws results in suppression when the search is otherwise constitutional.
- There is no good faith exception for pre-*McNeely* blood tests in Arizona.*
  * Except (*possibly/maybe/perhaps*) in medical exception cases.
- To avoid waiver, argue the following at the suppression stage:
  - That there was a true emergency: a warrant could not be obtained before the alcohol had substantially degraded in the bloodstream.
  - Good faith, when applicable (i.e. in medical exception cases).
  - The exclusionary rule does not require suppression for technical violations of A.R.S. § 28–1321 or § 28–1388(E) when the search was otherwise constitutional.

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